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BEN P. TOONE, KENT D. FULLER, ROBERT J. FULLER, HAYNES R. FULLER, and ROGER E. CANNON, Plaintiffs/Appellants, vs. WEBER COUNTY, a political subdivision, the WEBER COUNTY COMMISSION and COMMISSIONERS GLEN BURTON, KEN BISCHOFF and CAMILLE CAINE, MARK DeCARIA, Weber County Attorney, RULON JONES, an individual, and JOHN & JANE DOES 1-10 : Brief of Appellee

Utah Supreme Court

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IN THE UTAH SUPREME COURT

BEN P. TOONE, KENT D. FULLER, ROBERT J. FULLER, HAYNES R. FULLER, and ROGER E. CANNON, Plaintiffs/Appellants, vs. WEBER COUNTY, a political subdivision, the WEBER COUNTY COMMISSION and COMMISSIONERS GLEN BURTON, KEN BISCHOFF and CAMILLE CAINE, MARK DeCARIA, Weber County Attorney, RULON JONES, an individual, and JOHN & JANE DOES 1-10, Defendants/Appellees.	**BRIEF OF WEBER COUNTY APPELLEES** Appeal No. 20010142 **Oral Argument Priority No. 15**

APPEAL FROM A DECISION OF THE
SECOND JUDICIAL DISTRICT COURT, WEBER COUNTY
HONORABLE MICHAEL D. LYON, DISTRICT JUDGE

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STATEMENT OF JURISDICTION

The Supreme Court has appellate jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2-2(3)(j).

STATEMENT OF ISSUES AND STANDARD OF REVIEW

1. Was the trial court correct in ruling that appellants' claims are barred by the running of the 30-day statute of limitation in Utah Code Ann. § 17-27-1001(2)(a) where they filed their complaint nearly two and one-half years after the County's sale of the property in question?

A summary judgment on the statute of limitations issue presents a question of law which this Court reviews without deference to the trial court. Hill v. Allred, 2001 UT 16, ¶ 12, 415 Utah Adv. Rep. 13. This issue was preserved in the County's Memorandum in Support of its Motion for Judgment on the Pleadings (R. 141-145), the County's Supplemental Memorandum (R. 273-277), and its memorandum in support of its Cross Motion for Summary Judgment (R. 585-586).

2. Did the trial court correctly conclude that there is no statutory requirement for the County to provide notice and hearing prior to the sale of County property?

Questions of statutory construction present issues of law which this Court reviews for correctness. Longley v. Leucadia Financial Corp., 2000 UT 69, ¶ 13, 9 P.3d 762, 765. This issue was preserved in the County's Memorandum in support of its Cross Motion for Summary Judgment (R. 587-599).

CONTROLLING PROVISIONS OF STATUTES AND ORDINANCES

Plaintiffs/appellants have provided references to selected provisions of the County Land Use Development and Management Act dealing with the preparation, adoption and amendment of a general plan. Defendant/appellee Weber County does not agree, for the reasons more fully set forth below, that those statutory provisions are determinative of this appeal. However, to the extent they are important for the Court to review, the County respectfully submits that all of the statutory provisions addressing the purpose, preparation, adoption, amendment and effect of a general plan should be read in context, and therefore the Court is referred to Utah Code Ann. §§ 17-27-301 through 305, inclusive. In addition, the Court is referred to the following statutory provisions and Weber County Ordinance which the County contends are determinative of the issues in this case:

Utah Code Ann. § 17-27-1001(2)(a)

> Any person adversely affected by any decision made in the exercise of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local decision is rendered.

Utah Code Ann. § 17-5-242

> (1) The county may purchase, receive, hold, sell, lease, convey, or otherwise acquire and dispose of any real or personal property or any interest in such property that it determines to be in the public interest.
>
> (2) Any property interest acquired by the county shall be held in the name of the county unless specifically otherwise provided by law.
>
> (3) The county legislative body shall provide by ordinance, resolution, rule, or regulation for the manner in which property shall be acquired, managed, and disposed of.

Weber County Ordinance § 6-11-12(B)

> B. Real property may be disposed of by public auction, by listing with a licensed realtor, by negotiation, by trade, by sealed bid, or otherwise as disposition shall be approved by the County Commissioners prior to the commencement of negotiations or other means of disposition. The County Commissioners may refuse any or all offers or bids.

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This matter arises from the decision by the Weber County Commission to minimize a budget shortfall by the sale, and subsequent conveyance of, surplus County real property to Rulon Jones.[1] Because neither the statutes applicable to the sale of County-owned property nor the County ordinance addressing the disposition of real property require notice and hearing prior to the sale of such property, the County simply posted an agenda for a County Commission meeting held on March 11, 1997, that included notice of the proposed sale of the Property to Jones. The lead plaintiff in this matter, Ben P. Toone, knew of the sale within days of its occurrence. Despite this knowledge, no complaint was filed with the district court until nearly two and one-half years after the conveyance of the Property to Mr. Jones.

Appellants asserted several claims in their complaint, including a declaratory judgment action and prayer for mandamus. The crux of their position, and the central issue asserted on appeal, is that the County violated certain provisions of the County Land Use

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[1] Weber County, together with the Weber County Commission, Commissioners and County Attorney are collectively referred to herein as the "County."

Development and Management Act, Utah Code Ann. § 17-27-101, *et seq.* (the "Act"); and more specifically those provisions dealing with the preparation, adoption and amendment of a general plan, by selling what appellants have termed "general plan property" without notice and hearing.[2] Relying on this characterization of the Property, appellants make the tortured argument that because notice and hearing are required to amend the general plan, that notice and hearing requirement is somehow imputed to the sale of surplus property which does not change its use under the general plan.

These claims are based upon the provisions of the Act and are therefore subject to the statutorily provided appeal in Utah Code Ann. § 17-27-1001 on challenges to County land use decisions which imposes a 30-day statute of limitations.

B. COURSE OF PROCEEDINGS

After the complaint had been filed, Mr. Jones filed a motion to dismiss, arguing that the action was barred by the 30-day statute of limitations and by principles of laches and equitable estoppel, that the plaintiffs lacked standing to assert a claim against Mr. Jones, and that Mr. Jones was a good faith purchaser, not subject to a claim for damages (R. 64-74.) The County answered the complaint and moved for judgment on the pleadings based upon failure to commence the action within the 30-day statute of limitations and arguing that the declaratory judgment action and plea for mandamus failed as a matter of law.

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[2] Appellants have insisted on referring to the Property as "general plan property" or "GP property" as though it were a term of art. This term implies the existence of a category of property which is undefined by statute, ordinance or case law. There is no legal definition of "general plan property" and no legal or factual significance attaches to the phrase.

Appellants responded with the circular argument that the statute of limitations could not have commenced running because the County's actions which gave rise to the action were illegal. The trial court initially declined to rule on the motions and requested supplemental briefing on appellants' statute of limitations argument (R. 214.) Rather than limit their briefing to the issue identified by the court, appellants submitted a memorandum which treated a broader range of issues and argued that discovery was needed to determine whether there were any fact issues material to the legal questions presented.

After oral argument on May 18, 2000, the trial court took "the motion to dismiss under advisement." (R. 436.) It granted appellants permission to conduct further discovery and allowed appellees to file an additional response to appellants' memorandum. (*Id.*)

On August 21, 2000, appellants filed a motion for summary judgment. Mr. Jones responded by renewing his motion to dismiss and the County filed a cross motion for summary judgment. Appellants filed an additional "supplemental memorandum."

After oral argument on November 21, 2000, the court took the motions under advisement (R. 681.) On December 29, 2000, the court issued a lengthy memorandum decision denying appellants' motion and granting summary judgment to appellees (R. 682-700, attached as Addendum 1.) The court's summary judgment and order of dismissal were entered January 17, 2001 (R. 701-704, attached as Addendum 2.) Appellants subsequently initiated this appeal.

C. STATEMENT OF FACTS

Utah statute provides authority and discretion for counties to sell real property and to establish procedures for such sales. Utah Code Ann. § 17-5-242. The statute does not contain any requirement for notice or hearing prior to the sale of such property. The ordinance enacted by the County likewise contains no requirement for notice and hearing (R. 331, 520.)

On October 2, 1996, the County adopted by Resolution 46-96 the Ogden Valley General Plan (R. 509-518.) The plan serves as a guide to "community decisions in land use development policies" and encourages "development in a responsible and deliberate fashion, thereby protecting the natural beauty of the Ogden Valley, its natural resources, and its slopes, ridge lines, view and entry corridors, wildlife habitat, and stream corridors." (Memorandum Decision, R. 683.)

The property at issue in this matter lies within unincorporated Weber County in the Ogden Valley (the "Property") (R. 522-24.) The Property is a very small portion (160 acres) of all the publicly and privately owned properties encompassed in the Ogden Valley General Plan which are designated as appropriate for recreational uses (R. 513-15; Deposition of David Wilson 59:2-5, R. 605.) As the trial court observed in footnote 2 of its Memorandum Decision, although the Property was previously designated at one time as a "Park" on a County map dated January of 1967 (R. 673-74), that map was supplanted by the Ogden Valley General Plan adopted in 1996 and was never incorporated as part of the

General Plan (R. 684, n. 2.) There is no evidence that the County ever used or maintained the Property as a "park" in the traditional sense.

The County posted an agenda which included notice of the proposed sale of the Property to Jones and, pursuant to its statutory grant of authority, approved the sale of the Property and conveyed it by quitclaim deed to Rulon Jones on March 11, 1997 (R. 526, 683.) Mr. Jones' use of the Property is a recreational use consistent with the Ogden Valley General Plan and does not constitute a change from the designated use of the Property while owned by the County. (Wilson Dep. pp. 74-77, R. 535.)

While the quitclaim deed might arguably have included conveyance of a County owned right-of-way to the Property, the County and Mr. Jones have made a judicial admission that the County did not intend to convey the right-of-way to Mr. Jones (R. 337.) That judicial admission is binding upon the parties and their successors in interest as a matter of law, with the result that there was no conveyance of the right-of-way. That judicial admission was incorporated into the Memorandum Decision of the trial court (R. 683), and the Summary Judgment and Order of Dismissal (R. 702, ¶3).

SUMMARY OF ARGUMENT

The 30-day statute of limitations in Utah Code Ann. § 17-27-1001 bars all of appellants' claims, which are expressly based upon the provisions of the County Land Use Development and Management Act. Appellants argue that the statute of limitations does not apply because the action being challenged was not taken in compliance with provisions of the Act. However, to allow appellants to rely upon selected provisions of the Act dealing

with general plans without being subject to the statute of limitations imposed by the Act is facially absurd.

A similar weakness permeates appellants' circular argument that because the County allegedly failed to comply with the provisions of the Act, the statute of limitations never began to run. Logic aside, there is no legal authority to support the conclusion that the very act giving rise to a cause of action precludes the commencement of the limitation period applicable to that cause of action.

The County has statutory authority to sell surplus real property and has been granted broad discretion by the Legislature in establishing the procedures for the sale of such property. There is no express or implied statutory requirement for notice and hearing contained in the enabling statute. There is also no constitutional requirement for notice and hearing prior to the sale of publicly owned property. Whether such a requirement might make for good public policy is a decision reserved for the legislature. The current language of the statute, however, suggests a legislative intent that no notice and hearing is required unless otherwise established by the County's ordinances or rules. As previously noted, Weber County Ordinance § 6-11-12(B) did not contain any such requirement at the time of this sale.

Similarly, the statutory provisions addressing general plans in the Act found at Utah Code Ann. §§ 17-27-301 - 305 do not impose a notice and hearing requirement on the sale of publicly owned property. Appellants' argument is based upon the flawed premise that the sale of publicly owned property requires a general plan amendment which in turn

requires statutory notice and hearing. However, where there is merely a change in ownership of property without an accompanying change in the use of the Property, uses designated for the Property in the general plan are not implicated and no general plan amendment is required. In the present case, property owned by the County which is designated as appropriate for recreational uses continues to be designated as appropriate for recreational uses under private ownership by Mr. Jones. There is no basis for requiring an amendment of the general plan, which would trigger statutory notice and hearing requirements.

Appellants' arguments with respect to the allegedly improper conveyance of an accompanying right-of-way are moot. The County and Mr. Jones have judicially admitted that there was no intent to convey the right-of-way. That judicial admission was acknowledged in the Court's Memorandum Decision and carried over into the Summary Judgment and Order. There was, therefore, no conveyance as a matter of law.

ARGUMENT

I. APPELLANTS' CLAIMS ARE TIME-BARRED BY THE 30-DAY LIMITATION PERIOD IN §17-27-1001.

Appellants' claims and arguments, here and before the trial court, focus on the County's alleged violations of provisions of the Act found in Part 3, Utah Code Ann. §§ 17-27-301 - 305, related to the preparation, adoption and amendment of a general plan when it sold the Property. The County has consistently maintained throughout this case that the sale was made pursuant to Utah Code Ann. § 17-5-242 and the related County ordinance adopted pursuant to that broad delegation of authority, neither of which require

notice and hearing prior to the sale of surplus County property. Appellants, however, have based their claims on alleged violations of the Act in an unsuccessful attempt to infer or imply a notice and hearing requirement where non exists. By contrast, conspicuously absent is any attempt by the appellants to explain why this sale does not comply with the statutory provisions specifically applicable to such transactions in Utah Code Ann. § 17-5-242.

It is inherently inconsistent for appellants to expressly attack the sale as having been completed in violation of the provisions of the Act, and yet simultaneously argue that the sale was not made under the provisions of the Act and therefore not subject to the Act's limitations period. They ignore the obvious conclusion, for example, that an alleged failure by the County Commission to submit the proposed sale to the Planning Commission under § 17-27-305 is, by definition, a "decision" which is subject to the 30-day statute of limitation. They cannot be permitted to expressly assert a claim under the Act while simultaneously disregarding the statute of limitations expressly provided for claims based upon the Act.

Appellants claims based upon the general plan provisions in Utah Code Ann. §§ 17-27-301 - 305 are barred by the 30-day limitation period provided by the legislature in § 17-27-1001 as a specific avenue for judicial review of claims arising under Chapter 27. The plain language of the statute reflects a legislative intent to provide for a specific and relatively narrow judicial review of local land use decisions. Appellants have expressly based most of their claims on provisions of the Act; and the other activities complained of reflect

decisions made pursuant to the Act. Either the provisions of the Act relied upon by appellants do not apply to the sale of the Property to Jones, or appellants' claims based upon the Act are subject to the 30-day limitation period. They cannot have it both ways.

Appellants also make the circular argument that since the sale failed to satisfy the notice and hearing requirements of the Act for the amendment of a general plan, that somehow precludes triggering the Act's 30-day limitation period. In support, they cite Longley v. Leucadia Financial Corp., 2000 UT 69, 9 P.3d 762 and cases cited therein. Longley is neither factually nor legally similar to appellants' claims. In Longley and the cases relied upon by this Court in Longley, there were specific statutory notice requirements applicable to the procedures involved. In the present matter, there are no statutory notice requirements specifically applicable to a county's sale of property which is governed by § 17-5-242. Appellants' position relies on the tenuous argument that notice and hearing requirements applicable to a county's adoption and amendment of a general plan apply to the sale of surplus county property under an entirely separate statutory provision.

Appellants' discussion of Hatch v. Boulder Town Council, 2001 Ut.App. 55, 23 P.3d 245 is not applicable to this case. Hatch did not involve a statute of limitations defense. It dealt solely with the issue of whether the Town of Boulder had complied with enabling statutes in enacting a zoning ordinance. The present matter does not involve a zoning ordinance. Moreover, plaintiffs have produced no evidence that the County failed to comply with the statutory provisions of § 17-5-242, the statute from which it derives authority to sell publicly owned real property.

The other cases cited by appellants similarly provide no guidance. Lewis v. Kanab City, 523 P.2d 417 (Utah 1974) dealt with enactment of an ordinance for a special improvement district which failed to strictly follow the enabling statute; Wells v. Bd. of Adjustment of Salt Lake City Corp., 936 P.2d 1102 (Utah 1997) did not involve a statute of limitations defense; Henretty v. Manti City Corp., 791 P.2d 506 (Utah 1990) has no factual or legal relevance to the present matter.

There is no legal authority for the proposition that a statutory violation which gives rise to a cause of action simultaneously tolls the very statute of limitations expressly provided by the Legislature for such claims. Buying into this argument emasculates the statute of limitations and undermines the important public policy supporting the need for finality in challenging such decisions. If the alleged violation of a statute which creates a cause of action also concurrently tolls the running of the applicable statute of limitations, the 30-day limitation becomes superfluous, a result which defies both logic and the rules of statutory construction. A plaintiff could belatedly bring an action to invalidate a virtually unlimited range of local governmental decisions, ranging from property sales to zoning decisions to municipal contracts, regardless of how long ago the action was taken. Because the very act on which the cause of action is based would toll the limitation period, the statute would never begin to run. Such a result was certainly not contemplated by the legislature and when subjected to logical scrutiny, is facially absurd.

II. APPELLANTS HAVE NO STATUTORY OR CONSTITUTIONAL RIGHT TO NOTICE AND A HEARING PRIOR TO THE SALE OF COUNTY PROPERTY.

The County's authority to sell property comes from an express statutory grant of authority.

> (1) The county may purchase, receive, hold, sell, lease, convey, or otherwise acquire and dispose of any real or personal property or any interest in such property that it determines to be in the public interest.
>
> (2) Any property interest acquired by the county shall be held in the name of the county unless specifically otherwise provided by law.
>
> (3) The county legislative body shall provide by ordinance, resolution, rule, or regulation for the manner in which property shall be acquired, managed, and disposed of.

Utah Code Ann. § 17-5-242.

In addition to the specific authority to sell publicly owned property, the County is also granted broad discretion in establishing the manner for the handling of such transactions. There is no express or implied statutory requirement for notice or a hearing prior to the sale of County property. Similarly, the County's ordinance dealing with the sale of real property, § 6-11-12(B) (R. 344), does not contain any requirement for notice or hearing.

Appellants misunderstand the significance of this statute and the County's related ordinance, § 6-11-12. They conclude that "[t]hese other provisions are of no help whatsoever in interpreting Section 305, and it was error for the court to use them as an aid in statutory construction." (Appellants' Brief p. 27.) However, the trial court did not use § 17-5-242 to construe § 17-27-305. It simply concluded that § 17-5-242 applied to the

facts of this case and that statutory construction of § 17-27-305 and related statutes led to the conclusion that they were inapplicable. As discussed below, that conclusion was legally correct.

Appellants have never challenged the constitutionality of § 17-5-242. They simply argue that the statute is inapplicable because the allegedly more specific provisions of the general plan statutes control the sale of this property. Section 17-5-242 is presumptively valid and evidences a legislative intent to afford counties broad discretion in conducting the sale of real property.

A search of case law from all U.S. jurisdictions establishes that a sale of municipal property may be invalidated for failure to provide notice or a hearing only when the notice or hearing requirement is specified by statute. *E.g.,* Bagwell v. Town of Brevard, 148 S.E.2d 635, 638 (N.C. 1966) (sale invalid where statutory notice requirements not met); Bleecker Luncheonette, Inc. v. Wagner, 141 N.Y.S.2d 293, 300 (N.Y.Sup. 1955), *aff'd*, 143 N.Y.S.2d 628 (sale proper where statutory notice requirements met.)

At least two courts have addressed the sale of municipal property in the absence of a statutory notice or hearing requirement and both upheld the validity of the sales. In Hill v. City of Summit, 166 A.2d 610 (N.J. 1960), taxpayers challenged the sale of city land to a veterans organization based in part on the failure of the city to provide public notice prior to the sale. Noting the lack of any statutory requirement for notice, the court concluded that the city had discretion on whether to provide public notice.

> [P]laintiffs allude to the fact that the sale was made without public notice. Nowhere in [New Jersey statute] is there a requirement of

> public notice prior to a conveyance under the said statute, nor is there any provision in this statute which makes it subject to [another statute], relied on by plaintiffs as the basis for the requirement of notice. The conveyance was in accordance with the requirements of [the governing statute] and there is no constitutional provision which prohibits municipalities from making sales and conveyances unless public notice is given. This is left to the sound discretion of the Legislature.

Hill at 617. The Rhode Island Supreme Court reached a similar result in Ravenelle v. City of Woonsocket, 54 A.2d 376, 378 (R.I. 1947) (absent a provision of statute or ordinance the property sale details "are apparently left to the discretion of the city council.")

A review of state and federal case law confirms the conclusion of the Hill court that there is no constitutional prohibition on conveying municipal property without public notice or a hearing. To establish that notice or hearing is constitutionally required, plaintiffs must first demonstrate a property or liberty interest which is recognized by law as rising to the level of constitutional protection.

> We engage in a two step inquiry: (1) Did the individual possess a protected interest to which due process protection was applicable? (2) Was the individual afforded an appropriate level of process?

Hennigh v. City of Shawnee, 155 F.3d 1249, 1253 (10th Cir. 1998) (citation omitted). *See also* Lander v. Indus. Comm'n of Utah, 894 P.2d 552, 555 (Utah App. 1995) (plaintiff must demonstrate property interest which rises to the level of constitutional protection). At the trial court, appellants made only one conclusory allegation of a protected property right: "The public had rights of access, use and benefit in the WCPP which cannot be abrogated absent 'procedural fairness' . . ." (R. 502.) This alleged right is not recognized by state or

federal law as being entitled to due process protection. No Utah case law recognizes such an abstract right.

"The existence of a property interest is defined by existing rules or understandings that stem from an independent source such as state law." Driggins v. City of Oklahoma City, 954 F.2d 1511, 1513 (10th Cir. 1992) (citation and internal quotations omitted). "To have a property interest . . . a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Bd. of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972).

The Utah Legislature expressly did not recognize the type of property right asserted by plaintiffs when it statutorily authorized counties to sell publicly owned property without imposing a notice or hearing requirement. Utah Code Ann. § 17-5-242.

Appellants rely on two cases to demonstrate their alleged right to notice and hearing on the sale of surplus public property. They cite Stone v. Salt Lake City, 356 P.2d 631, 636 (Utah 1960) for the proposition that this Court has "upheld the requirement of notice for the sale of public property." (Appellants' Brief p. 41.) Appellants' conclusion is inconsistent with parts of the cited paragraph which they chose to omit. For example, the Stone court recognized that the city could have used a procedure for selling the Property other than publicizing and holding a hearing on the disposal of the Property. "[T]he City may have followed some other method than it did . . ." Stone at 636. The language on which appellants rely is therefore simply dicta arising in a completely different context. In

Stone, the court did not establish notice and hearing as a requirement for sale of surplus land. It merely held that the City's publication of the disposition proposal and holding of a public meeting were appropriate.

Moreover, two observations by the Stone court undermine appellants' arguments with respect to the sale of the Property. Stone arose under a different statutory context applicable to municipalities. The Stone court noted, however, that a statute which confers powers upon cities in relation to "streets, alleys, avenues, boulevards, sidewalks, parks, airports and public grounds" and authorizes a city to vacate them by ordinance did not apply to the sale of municipal real property, specifically the city's public safety building. Stone at 636. The statutory language noted by the court is similar to that relied upon by appellants. The Stone court also looked to the language of the applicable statutes and observed that there was no "express provision in our statutes which would prohibit the procedure followed here." *Id.* Similarly, there is no express provision in the statutory language empowering the County to sell property which imposes the procedural requirement for notice and hearing.

Appellants' argument based upon W. & G. Co. v. Redevelopment Agency of Salt Lake City, 802 P.2d 755 (Utah App. 1990) suffers a fundamental analytical flaw. That case does not deal with a general right of the public to notice and hearing but with the specific property rights of individual property owners which might be subjected to the exercise of eminent domain powers by a redevelopment agency. Appellants' attempted expansion of the due process protection of this narrow, clearly identified individual property right to a

broad public right to notice and hearing on the sale of publicly owned property requires a large and unwarranted analytical leap.

Appellants' selective citation from W. & G. omits the underlying basis for the court's ruling that notice and hearing were required.

> Because redevelopment is a serious action with potential to harm individual property rights, the Utah Supreme Court has held that "strict compliance with the enabling legislation is required to enact an ordinance setting up a redevelopment plan." Furthermore, "where the [redevelopment] statute prescribes certain steps to be taken before initiating condemnation proceedings, such steps are jurisdictional, and may not be disregarded."

W. & G. at 761 (emphasis added, citations omitted). The crucial allegation in W. & G. was that the redevelopment agency had failed to adequately provide the statutorily required notice to specific landowner plaintiffs, thereby failing to satisfy a jurisdictional prerequisite to having a valid redevelopment plan for the area and violating their constitutional due process protections.

W. & G. dealt with the protection of specific individual property rights which could be lost by exercise of the power of eminent domain. The legislature imposed specific requirements to protect those rights, making them jurisdictional with respect to an RDA's exercise of eminent domain. By contrast, W. & G. did not address broad, legally undefined rights of the general public with respect to the sale of surplus land owned by a public entity. There are simply no parallel circumstances which would make the W. & G. case applicable to this case.

Appellants have failed to demonstrate a specific, recognized individual property interest meriting constitutional protection. Contrasted with the specific provisions applicable to RDAs, the legislature has imposed no such requirement for notice or hearing prior to the County's sale of publicly owned property, statutorily leaving the details of such sales to the County's discretion. There is simply no statutory or constitutional requirement for notice or hearing prior to the sale of county property.

III. STATUTORY PROVISIONS REGARDING GENERAL PLANS DO NOT IMPOSE A NOTICE OR HEARING REQUIREMENT UPON THE COUNTY PRIOR TO THE SALE OF PUBLICLY OWNED PROPERTY.

To avoid the inescapable legal conclusion that there is no constitutional or express statutory right to notice and a hearing prior to the sale of property owned by the County, appellants seek to impose a notice requirement by invoking the general plan provisions of Chapter 27, Part 3 of the Act, Utah Code Ann. §§ 17-27-301 - 305. They urge the Court to find that those provisions of the Act, including publication of notice, holding a hearing and submission to the planning commission, apply to the sale of all publicly owned property. To do so, the Court must accept three questionable propositions that are fundamental to the argument. First, the Court must recognize a newly created category of "general plan property" to which it must then attach a legal significance which does not presently exist. Second, it must read portions of the general plan statutes selectively and out of context. Third, it must ignore the legislative purpose behind the general plan provisions of the Act and engage in judicial legislation by creating a broad public policy which is not evidenced by a reasonable interpretation of the plain language of the statute. The Court

should respectfully decline this invitation to violate the separation of powers doctrine and invade the province of the legislature.

It is important to recognize that there is no such thing as "general plan property" or "GP property." The phrase is not defined by statute and the County has not been able to locate any reported case or treatise in which the phrase has been used. There is no question that the Property lies within the area covered by the Ogden Valley General Plan. In that respect, the entire Ogden Valley is "general plan property," whether publicly or privately owned.[3] The term "general plan property" carries with it no factual or legal significance. In analyzing appellants' arguments, we must avoid the inference that the term imposes any status on the Property distinct from any other property within the Ogden Valley, whether publicly or privately owned, or any other property encompassed by a "general plan" whether in other areas of Weber County or throughout the State of Utah.

It is also fundamental to an analysis of appellants' arguments to understand the broad purpose and function of a general plan. A general plan "means a document that a county adopts that sets forth general guidelines for proposed future development of the land within the county . . ." Utah Code Ann. § 17-27-103(h)(i). A general plan deals with uses of properties and serves as a guide for development of those properties consistent with the identified uses.[4] A general plan is a blueprint for making land use decisions. Citizens for

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[3] In this respect, the conveyance of the Property to Mr. Jones does not change it from being "general plan property" to some other type of property.

[4] *E.g.*, Showah v. Planning & Zoning Comm'n of the City of Bridgeport, 2000 WL 773059 (Conn. Super. 2000) (general plan to "control and direct the use and development of property"); County of Amador v. El Dorado County Water Agency, 91 Cal.Rptr.2d 66,

Mount Vernon v. City of Mount Vernon, 947 P.2d 1208, 1214-15 (Wash. 1997). It is a "recommendation of the most desirable use of land." Theobald v. Bd. of County Comm'rs, 644 P.2d 942, 948 (Colo.1982). The key here is that a general plan deals with the uses of property, not the ownership of property.

Appellants apparently do not understand the nature of "use" as it applies to the statutes upon which they rely. They argue that "it was error for the trial court to construe the 'use' of the Property prior to the sale to Jones as simply 'recreational,' when it had many other 'uses' as well." (Appellants' Brief p. 15.) With respect to general plans, "use" is a term of art. Counties are granted broad discretion to promote a wide range of public policy goals and objectives in a comprehensive general plan as outlined in Utah Code Ann. §§ 17-27-301 - 302. Consistent with that statutory delegation of authority, Weber County has identified a number of public policy goals and objectives which are intended to protect the natural beauty and character of the Ogden Valley including, but not limited to, air quality and water resources, open space and sensitive lands, wildlife habitat, etc. (R. 509-518). While generally discussing recreational uses as the best means of promoting the protection of those natural characteristics, the plan does not distinguish between public and private ownership as a means to accomplish those objectives.

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77 (Cal.App. 1999) *review denied* (general plan embodies "fundamental land use decisions"); Fritz v. Lexington-Fayette Urban County Government, 986 S.W.2d 456, 459 (Ky.App. 1999) *review denied* (general plan considers current land uses in addressing future development); Osiecki v. Town of Huntington, 565 N.Y.S.2d 564, 565 (N.Y.App. 1991) (general plan is compilation of land use policies).

Whether the general plan statutes dictate requirements for the sale of County owned property is a matter of statutory construction. This Court reviewed some of the applicable rules of statutory construction in Perrine v. Kennecott Min. Corp., 911 P.2d 1290 (Utah 1996).

> [T]his Court's primary responsibility in construing legislative enactments is to give effect to the Legislature's underlying intent. Generally, the best indication of that intent is the statute's plain language. Thus, we will interpret a statute according to its plain language, unless such a reading is unreasonably confused, inoperable, or in blatant contravention of the express purpose of the statute. In addition, statutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and ... interpretations are to be avoided which render some part of a provision nonsensical or absurd.

Perrine at 1292 (internal quotations, citations omitted). In addition, "a statute should not be construed in a piecemeal fashion but as a comprehensive whole." Clover v. Snowbird Ski Resort, 808 P.2d 1037, 1045 (Utah 1991). "If there is doubt or uncertainty as to the meaning or application of the provisions of an act, it is appropriate to analyze the act in its entirety, in light of its objective, and to harmonize its provisions in accordance with its intent and purpose." *Id.* (citation omitted).

Also, while not part of the statute, it is appropriate to consider a statute's title if the language of the statute creates an ambiguity. Jenkens v. Percival, 962 P.2d 796, 800 (Utah 1998). "A statute is ambiguous if it can be understood by reasonably well-informed persons to have different meanings." Provo City v. Cannon, 1999 UT App. 344, ¶ 6, 994 P.2d 206, 208. The fact that the parties ask the Court to draw very different inferences

from the statutory language at issue supports a determination that there is some ambiguity in that language.

The intent and purpose of the general plan statutes is to provide for a plan for land uses and future development and to preserve the integrity and functionality of that plan. Any question as to the meaning of the general plan statutes must be evaluated in light of this purpose and intent.

Appellants begin their analysis with two flawed assumptions. The first, discussed above, is that there is a legal significance to the term "general plan property" which attaches to the Property. For the reasons discussed above, this assumption lacks merit. The second assumption, implied rather than explicit, is that the provisions of the Ogden Valley General Plan specifically contemplates the continued public ownership of the Property, rather than simply identifying various goals and objectives with respect to the contemplated future use of the Property, whether under public or private ownership. These flaws undermine, from the beginning, appellants' arguments with respect to the applicability of the general plan statutes to the sale of publicly owned property.

A. SALE OF THE PROPERTY WHICH DID NOT CHANGE ITS USE FROM RECREATIONAL TO ANOTHER USE DID NOT REQUIRE AN AMENDMENT TO THE GENERAL PLAN. THE NOTICE AND HEARING REQUIREMENTS FOR A GENERAL PLAN AMENDMENT ARE THEREFORE INAPPLICABLE TO THIS SALE.

The provisions of Title 3 of the Act all deal with general plans. The title to § 17-27-305 is "Effect of the plan on public uses." The express intent of the provisions of § 17-27-305, therefore, is to deal with the general plan in the context of public uses. The

language of the statute, "selling . . . any . . . property," creates some ambiguity as to whether the statute applies to public use of property or to all publicly owned property. The essence of appellants' argument is that the sale of any publicly owned property, regardless of the contemplated nature of the use, as opposed to a property serving a public use, invokes the provisions of § 17-27-305. That argument is inconsistent with the conclusion implied by the section's title and with the overall intent and purpose of the general plan statutes. To accommodate appellants' argument, the Court must insert substantive terms into the statute which it does not contain, a construction which is not permitted. Webb v. Ninow, 883 P.2d 1365, 1367 (Utah App. 1994).

The fundamental problem with appellants' suggested construction of § 17-27-305 becomes apparent when they attempt to take their analysis one step further, arguing that the sale of any publicly owned property requires an amendment of the general plan which in turn requires statutorily mandated notice and hearing. Despite the fact that the general plan deals with uses of property, appellants argue that the intended future uses of the Property are not relevant to application of the general plan requirements.

In their arguments, both before the trial court and this Court, appellants fail to address or resolve a glaring analytical weakness in their position, which is amply illustrated by asking the following simple question: What type of amendment to the general plan would be required by the sale of a publicly owned parcel of property under circumstances where no change in use is anticipated from what is otherwise allowable under the general plan? Appellants have never provided a satisfactory answer to that critical question. The

statute cannot be reasonably interpreted as requiring an amendment to the general plan where there is no change in the anticipated or designated use of the Property. Such a construction is simply "nonsensical and absurd" and is not permitted by the rules of statutory construction. Perrine at 1292. If there is no basis for amending the general plan to designate the Property for a different use, no such amendment is required. If an amendment is not required, the statutory notice and hearing provisions do not come into play.

The Property, along with a substantial portion of other property within the Ogden Valley, both publicly and privately owned, is designated for recreational uses. The recreational use designation in the general plan makes no distinction between the ownership of the properties. All similarly situated properties are designated for the same recreational use. The general plan identifies only the broad public policy goals and objectives sought to be advanced through the anticipated recreational use of those properties, regardless of the nature of their ownership. The Deputy County Attorney recognized this distinction with respect to whether a general plan amendment was required.

> If this property had been listed under the general plan, not just as recreational use but as public recreational and not included private recreational property as well, then it may have triggered an amendment to the general plan.

(Deposition of David Wilson 73:1-5, R. 560.)

The County's sale of the Property to Mr. Jones did not change the use of the Property from the recreational use designated in the general plan. Mr. Jones may only use the Property for recreational purposes consistent with both the general plan and existing

zoning. If he wishes to change that use of the Property, he must apply for a general plan amendment and zoning change, which would require notice and hearing. In other words, contrary to appellants' arguments, the prospective purchaser's intended use of a parcel of property is not only relevant but critical to the issue of whether a general plan amendment is required under any circumstances, not just the sale of publicly owned property. A simple change in ownership without a change in the use of property does not trigger the need for a general plan amendment.

Despite the fact that the sale of the Property did not change its use, thereby triggering the need for a general plan amendment, appellants stretch their already tenuous position to argue that the notice and hearing requirements for general plan amendments under § 17-27-303 apply to the sale of the Property and were jurisdictionally required prior to the sale. Appellants have never established a logical basis for requiring a general plan amendment prior to the sale of the Property to Mr. Jones. They have never identified what such an amendment might accomplish, how it might be worded, or how it could be enacted without changing the designated use of the Property. Absent any clear statutory basis for or objective to be accomplished in amending the general plan, the notice and hearing requirements in §§ 17-27-303 and -304 are simply not triggered.

B. THE COUNTY'S SALE OF THE PROPERTY WITHOUT REFERRAL TO THE PLANNING COMMISSION DOES NOT MAKE THE SALE INVALID.

Appellants argument that the sale is void for failure of the County Commission to refer the proposed sale to the Planning Commission lacks statutory and legal support.

Aside from such a referral being inconsistent with the apparent purpose of § 17-27-305, there is no requirement by statute or local ordinance for the Planning Commission to review a proposed sale of County property.

The powers of a planning commission are specifically enumerated in § 17-27-204. There is no provision in that section which assigns any role to the Planning Commission in the proposed sale of county-owned property. There is, however, statutory authority for the planning commission to review and give recommendations with respect to general plan amendments and zoning ordinances.

The only reasonable interpretation of § 17-27-305 is that where publicly owned property is designated under the general plan as intended specifically for public use, its sale may result in a change of use which requires a general plan amendment. In that case, the provisions of § 17-27-305 are triggered, requiring referral to the planning commission along with notice and hearing for a general plan amendment. However, the sale of a parcel of publicly owned property not otherwise designated under the general plan as intended specifically for public use, where no change in the fundamental nature of the use is anticipated, does not require a general plan amendment. In that case, neither referral to the planning commission nor notice and hearing of a general plan amendment are mandated. The County's sale of the Property to Jones clearly falls within the latter scenario. There is, therefore, no notice and hearing requirement mandated by the general plan statutes.

IV. COUNTIES HAVE BEEN GRANTED BROAD DISCRETION TO DETERMINE THE MANNER IN WHICH PUBLIC PROPERTY SHOULD BE SOLD. ANY CHANGE IN THAT POLICY IS A MATTER RESERVED FOR THE LEGISLATURE.

Appellants argue that it is "unsound public policy to allow a county to sell public property without public notice and a hearing." (Appellants' Brief p. 39.) They invite this court to impose a notice and hearing requirement which the legislature chose not to impose. The Court should respectfully decline this invitation to engage in judicial legislation.

The determination of appropriate public policy with respect to the sale of public property is a subject for the legislature. State ex rel. S.L., 1999 UT App. 390, ¶ 57, 995 P.2d 17, 30 ("The legislature is the place constitutionally anticipated for determinations of complex public policy.") *See also* State v. Herrera, 895 P.2d 359, 362 (Utah 1995) (the "delicate balancing of public policy is better accomplished in the legislature than in the courts.")

This Court has stated its reluctance to insert requirements into legislation for public policy reasons where the legislature could have chosen to do so but did not include such requirements. State v. Larsen, 865 P.2d 1355, 1360 (Utah 1993). This Court has also observed that significant omissions in statutory language "should be taken note of and given effect." Biddle v. Washington Terrace City, 1999 UT 110, ¶ 14, 993 P.2d 875, 879 (punctuation, citation omitted). *See also* In re Criminal Investigation, 754 P.2d 633, 656 (Utah 1988) (legislature's omission indicated legislature's intent); Traylor Bros., Inc./Frunin-Colnon v. Overton, 736 P.2d 1048, 1052 (Utah App. 1987) ("Under ordinary

principles of statutory construction, we must assume that the legislature advisedly omitted the word 'willful' and that the statute evidences the legislature's intent [that willfulness not be an element].")

While the relative merits of requiring notice and a public hearing prior to the sale of publicly owned property undoubtedly makes for a spirited public policy debate as reflected by the positions of the parties in this case, the balancing of those policy interests is a matter for the legislature. The trial court agreed.

> The court is sympathetic with plaintiffs' position that it is desirable that sales of publicly owned real property occur openly, through meaningful notices and hearings to the public, and perhaps that is a matter that the legislature ought to review. However, this court may not substitute its judgment for the legislature's and impose a requirement of notice and hearing where none exists under the law. This court has the responsibility to interpret the law only and then to follow it.

(Memorandum Decision, R. 698.)

The fact that there is no notice or hearing requirement in § 17-5-242 is suggestive of a legislative intent that no notice or hearing is required. The legislature has granted counties broad discretion in formulating procedures for the sale of county property. Absent clear evidence of intent to the contrary, it must be assumed that the legislature intended to grant discretion as to whether to include a notice and hearing requirement in those procedures. If the legislature intends otherwise, it can and should amend the statutory language. It is appropriate for the Court to adhere to its traditional reluctance to interfere with that legislative prerogative.

V. APPELLANTS ARGUMENTS WITH RESPECT TO THE RIGHT OF WAY ISSUES ARE MOOT AND NEED NOT BE ADDRESSED BY THIS COURT.

This Court has adopted a sound policy of avoiding unnecessarily adjudicating issues which are moot. *See, e.g.,* Burkett v. Schwendiman, 773 P.2d 42, 44 (Utah 1989) ("A case is deemed moot when the requested judicial relief cannot affect the rights of the litigants.") Both the County and Mr. Jones, as acknowledged by appellants, have admitted on the record that they did not intend for the recorded deed to convey the County's rights in the recorded right-of-way. An admission of a fact in litigation is a judicial admission conclusive on the party making the admission and on his successors in interest. Baldwin v. Vantage Corp., 767 P.2d 413, 415 (Utah 1984); Condas v. Condas, 618 P.2d 491, 495-96 (Utah 1980). In addition, that judicial admission was incorporated in the Court's Memorandum Decision (R. 683) and as part of the Summary Judgment and Order from which this appeal was taken (R. 702).

Appellants argue that this judicial admission "is tantamount to an admission that notice and a hearing was required for the sale of the WCPP also." There is no logical factual or legal connection between the admission that the parties did not intend to convey the right-of-way and a legal conclusion that notice and hearing were required for the sale of the Property.

More importantly, the underlying issues and arguments with respect to the right-of-way are moot and need not be addressed as part of this appeal.

CONCLUSION

There is no statutory or constitutional requirement for notice and hearing prior to the sale of county-owned property. The general plan provisions of the County Land Use Development and Management Act do not impose such a requirement on this sale. There was no change in the use of the Property which would trigger the need for a general plan amendment. The notice and hearing requirements for a general plan amendment therefore have no application to these facts and circumstances.

Despite the undisputed fact that the sale of the Property was public knowledge and specifically known by at least one of the appellants within days of the sale, no legal action challenging the sale was commenced until approximately two and one-half years after the conveyance. The substance of this litigation, based upon the claims asserted by appellants, centers on the applicability of the general plan provisions in §§ 17-27-303, -304, and -305. The action is therefore barred by the running of the 30-day statute of limitations in § 17-27-1001.

The trial court therefore correctly determined that the County's sale of the Property was valid as a matter of law. The County respectfully requests that this Court affirm the trial court's decision.

DATED this 5th day of September, 2001.

WILLIAMS & HUNT

By Jody K Burnett
Jody K Burnett
Attorneys for Weber County Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of September, 2001, two (2) true and correct copies of the foregoing **Brief of Weber County Appellees** were mailed postage prepaid thereon, by first class mail in the United States mail, to the following:

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ADDENDA

1 Memorandum Decision, dated December 29, 2000 (R. 682-700)

2 Summary Judgment and Order, dated January 17, 2001 (R. 701-704)

ADDENDUM 1

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY

OGDEN DEPARTMENT, STATE OF UTAH

Ben P. Toone, Kent D. Fuller, Robert J. Fuller, Haynes R. Fuller, and Roger E. Cannon, Plaintiffs, vs. Weber County, a political subdivision; the Weber County Commission; Weber County Commissioners Glen Burton, Ken Bischoff and Camille Caine; Mark DeCaria, Weber County Attorney; Rulon Jones, an individual, and John and Jane Does 1-10 Defendants.	Memorandum Decision Case No. 990907314 Judge Michael D. Lyon

Plaintiffs move for summary judgment against the defendants, and the defendants file cross-motions for summary judgment against the plaintiffs.[1] The court grants summary judgment in favor of the defendants. The plaintiffs' claims are dismissed with prejudice.

BACKGROUND

In February 1997, Weber County sold to Rulon Jones ("Jones") 160 acres of undeveloped real estate known as the Wolf Creek Park Property ("the property"), in an effort to extinguish a budget shortfall. The property is west of the Powder Mountain Ski Resort in the Ogden Valley or

[1]Defendant Rulon Jones filed a motion to dismiss, or a motion on the pleadings. He later filed affidavits in support of his motion. Under rule 12(c), Utah Rules of Civil Procedure, if the court considers "matters outside the pleadings," the motion shall be treated as one for summary judgment and disposed of as provided in rule 56.

the environs of Huntsville, Eden, and Ogden Canyon of Weber County. Plaintiffs allege, essentially, that the county violated certain statutes in selling the property and that the county sold the property for inadequate compensation. They ask the court to void the transaction. Defendants deny plaintiffs' allegations and seek dismissal of plaintiffs' complaint with prejudice.

FACTS SUPPORTING SUMMARY JUDGMENT

In deciding a motion for summary judgment, the court should consider only those facts "material to the applicable rule of law." *Norton v. Blackham*, 669 P.2d 857, 859 (Utah 1983). Accordingly, the following undisputed facts are material to and dispositive of the legal issues:

1. Under the County Land Use Development and Management Act ("the act"), Utah Code Ann. § 17-27-101, *et. seq.*, the Weber County Commission adopted a General Plan ("the plan") for the Ogden Valley with Resolution 46-96 on October 2, 1996.

2. The resolution states that the plan shall serve to guide community decisions in land use development policies and to encourage development in a responsible and deliberate fashion, thereby protecting the natural beauty of the Ogden Valley, its natural resources, and its slopes, ridge lines, view and entry corridors, wildlife habitat, and stream corridors.

3. The county posted an agenda for a county commission meeting held on March 11, 1997, that included notice of the sale of the property to Jones. Following approval of the sale in the county commission meeting, Weber County conveyed the property to Jones by quitclaim deed on March 11, 1997. Jones recorded that deed on March 25, 1997.

4. Under the quitclaim deed, the county also inadvertently conveyed a 30-foot public right-of-way. The county and Jones made a judicial admission that the right-of-way was not conveyed and remains with Weber County, as reflected in the original conveyance to the county.

5. The county did not give any other public notice or a hearing before selling the property to Jones.

6. The plan covers the property and permits a recreational use.

7. Before the sale, the property had a recreational use, including hunting. Following the sale, it has a recreational use,[2] including hunting. Jones limits the hunting, however, to persons who pay a fee.

8. Plaintiffs did not commence this action until October 25, 1999, more than two and one-half years after the county conveyed the property.

ISSUES

The motions for summary judgment present the following questions: (1) Are plaintiffs' claims barred by the running of the applicable statute of limitations, Utah Code Ann. § 17-27-1001(2)(a)? (2) Does state law or constitutional due process require the county to give public notice and to hold a public hearing before selling the property to Jones?

ANALYSIS

I. Summary Judgment

"Summary judgment is warranted when 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Shattuck-Owen v. Snowbird Corp.*, 2000 UT 94, ¶9 (quoting Utah R. Civ. P. 56(c)). "Where the parties assert a

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[2]To their supplemental memorandum filed with the court on December 22, 2000, plaintiffs attached a map prepared originally by the Weber County Planning Commission in 1967 and reprinted again by the planning commission in 1984. The legend of the map indicates "Ogden Valley Study" and gives a "Physical Development Plan Interpretation" by using different colors on the map. Under the legend, the map shows that the property was designated as a park. When the county adopted the general plan in 1996, however, nothing under the plan designated the property as a park or implemented this map to show its use restricted to a park.

factual dispute, summary judgment is appropriate only when, viewing the facts in a light most favorable to the party opposing the motion, the moving party is nevertheless entitled to judgment." *Russell v. Thomson Newspapers*, 842 P.2d 896, 898 (Utah 1992); *see Burton v. Exam Ctr. Indus. & Gen. Medical Clinic, Inc.*, 2000 UT 18, ¶4 (citations omitted) ("Before granting summary judgment, a court must, after viewing the facts in the light most favorable to the nonmoving party, find that no disputed issues of material fact exist and that the moving party is entitled to judgment as a matter of law."). Summary judgment is not precluded "simply whenever some fact remains in dispute, but only when a material fact is genuinely controverted." *Heglar Ranch, Inc. v. Stillman*, 619 P.2d 1390, 1391 (Utah 1980) (footnote omitted).

In this case, both parties are in agreement that there is no dispute as to any material facts, and each side asks the court to rule as a matter of law on the issues presented in the memoranda.[3]

II. Statue of Limitations Under § 17-27-1001

Plaintiffs seek judicial review of the county's decision to sell the property to Jones under the County Land Use Development and Management Act, found in Utah Code Ann. § 17-27-

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[3]There is a facial dispute of fact in plaintiffs' reply memorandum, p. 2, concerning the recreational use of the property after the sale of the property. Plaintiffs argue that a change in ownership intrinsically changes the use from one of unfettered public use to restricted public use. Following a telephone conference with counsel on the record on December 19, 2000, the court finds that there is no dispute that the property was used for recreational purposes before the sale and continues to be used for recreational purposes after the sale. The court recalls both sides taking that position during arguments on the motions for summary judgment as well. The court concludes that plaintiffs' denial in his memorandum is really a legal argument, not a fundamental factual dispute. Therefore, the court concludes as a matter of law, based on the purposes of the act, that it is immaterial under the act whether it is a private recreational use or a public recreational use, so long as the *nature of the use* conforms to the general plan. Accordingly, the court entered finding no. 7 as an undisputed fact earlier in this decision.

101, *et seq.*[4] Defendants assert that the statute of limitations in § 17-27-1001 limits this court's review of county land use decisions to a period of 30 days after the county has made its decision. The court agrees. The 30-day statute of limitations reads as follows:

> (2)(a) Any person adversely affected by any decision made in the exercise of the provisions of this chapter may file a petition for review of the decision with the district court within 30 days after the local decision is rendered.
>
> . . .
>
> (3) The court shall:
>
> (a) presume that land use decisions and regulations are valid; and
>
> (b) determine only whether or not the decision is arbitrary, capricious, or illegal.

This limitation period promotes the public policy of making land use decisions final. The statute of limitations forecloses the plaintiffs' claims, allowing Jones to rely on the county's conveyance and proceed to use the property consistent with the pre-existing use or to seek a change in land use by the procedure provided under the act, without fear of a challenge to the sale.

To avoid the application of the statute of limitations, the plaintiffs offer the following

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[4]Although plaintiffs attempt to characterize their claims as seeking a declaration of "their rights and other legal relations," to avail themselves of the lengthier statute of limitations found in the Declaratory Judgment Act, Utah Code Ann. § 78-33-1 *et seq.*, plaintiffs premise all their other arguments under the County Land Use Development and Management Act, Utah Code Ann. 17-27-101 *et seq.* Thus the statute of limitations under § 17-27-1001 governs the county's decisions under that act. Furthermore, since the County Land Use Development Act is more specific than the Declaratory Judgment Act, the court applies the more specific statute of limitations. *See Jensen v. IHC Hospitals, Inc.*, 944 P.2d 327 (applying a two-year medical malpractice statute of limitations in favor of a more general provision not specifically aimed at medical malpractice claims. Moreover, plaintiffs may not re-characterize their claims in a different fashion in order to avoid the application of this more specific statute and escape the closure it gives to land use decisions. *See DOIT, Inc. v. Touche Ross & Co.*, 926 P.2d 835, 842 (Utah 1996) (rejecting re-characterization of tort claim as a contract claim to avoid limitation bar).

arguments: 1) that the discovery rule tolls the statute of limitations; and 2) that state law and constitutional due process required both the Weber County Planning Commission and the Weber County Commissioners to give public notice and to hold a public hearing before selling the property, and because the county failed to give the public notices and to hold the public meetings, the statute of limitations was tolled.

Such defenses lack statutory or case law support, as explained below. In this case, the county commission made a decision to convey the property to Jones on March 11, 1997. The court rules as a matter of law that the statute of limitations began to run on that date, barring plaintiffs' claims, brought more than two and one-half years after the county's decision to sell the property.

III. DISCOVERY RULE

Plaintiffs urge the court to apply the discovery rule to extend the statute of limitations. To invoke the discovery rule, plaintiffs must show that the county affirmatively concealed their cause of action or that exceptional circumstances exist. *See Snow v. Rudd,* 2000 UT 20, ¶ 10, 998 P.2d 262 (Utah 2000); *Hom v. Utah Department of Public Safety,* 962 P.2d 95, 102 (Utah Ct. App. 1998). The county's concealment must be such as to preclude a reasonable plaintiff from discovering the claim earlier and bringing it within the statutory period. *See Warren v. Provo City Corp.,* 838 P.2d 1125, 1130 (Utah 1992). Moreover, the concealment must involve a claim of equitable estoppel or plaintiffs must show that, "under the circumstances, [they] acted in a reasonable manner." *Warren* at 1129-30.

Plaintiffs provide no legal or factual basis upon which the court may toll the statute. Plaintiffs acknowledge that Ben Toone learned of the conveyance within just a few days after it

occurred, thereby refuting the notion that the county affirmatively concealed the transaction from at least him. Further, Jones recorded the deed on March 25, 1997, after the county conveyed the property on March 11, 1997, thus, arguably, imparting constructive notice of the conveyance on March 25, 1997. In passing, the court recalls further, in other hearings, that there seemed to be no dispute that newspapers reported the sale when it occurred, though this is not a specific finding of the court.

Plaintiffs contend that Deputy County Attorney David Wilson had a responsibility at the outset to protect the public's interest and challenge the sale. They assert that he instead "misled Ben Toone by telling him that the sale was 'legal.'" This contention is untenable. First, it is undisputed that Mr. Wilson did not conceal the conveyance, the event triggering the statute of limitations. Second, nothing precluded Mr. Toone from obtaining a second legal opinion, which, in hindsight, might have made the statute of limitations issue moot, assuming he acted timely. Third, based on the analysis in this decision, the court believes that Mr. Wilson gave a sound legal opinion.

The court finds no factual or legal foundation for tolling the statute of limitations for "exceptional circumstances" either, certainly nothing that would outweigh the clear legislative intent to provide a limited period for judicial review of local land use decisions or outweigh the strong public policy behind the limitation period of lending predictability and finality to county land management transactions.

Finally, none of the plaintiffs contends that he did not discover the sale until 30 days prior to the filing of their complaint. Therefore, plaintiffs present no justification for waiting more than two and one- half years to file their suit.

IV. Sale of Property without Notice and Hearing

Plaintiffs argue that the county's failure to give statutory public notice and hearing before making the sale to Jones tolled the limitation period. They further maintain that the county's failure to do so implicated constitutional due process concerns. The court disagrees with both of these premises. It is undisputed that the county did not provide any notices or hearings before the public, except for posting an agenda referencing the county's consideration to sell the property to Jones and an open county commission meeting on March 11, 1997, in which the decision to sell was made. The court agrees with the defendants that no other notices or public hearings were required by state or local law. Further, the plaintiffs have no individual interest in the subject property to implicate constitutional due process concerns.

The law will invalidate the sale of municipal real property only when a statute requires notice and hearing and no notice or hearing was given, *Bagwell v. Town of Brevard,* 148 S.E.2d 635, 635 (N.C. 1966), or when constitutional due process has been violated, *Lander v. Indus. Comm'n of Utah,* 894 P.2d 552, 555 (Utah App. 1995).

A. Statutory Notice and Hearing Not Required

No Utah statute or county ordinance requires public notice and hearing concerning the sale of surplus real property when the sale involves only a change in ownership and not a change in land use.[1] Under Utah law, a county may sell property and its county commissioners may establish the manner of selling publically owned property:

> (1) The county may purchase, receive, hold, sell, lease, convey, or otherwise acquire and dispose of any real or personal property or any interest in such

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[1]As used in this ruling, "surplus real property" means real property not used by the county for any other publicly dedicated use, such as a park or street.

> property that it determines to be in the public interest.
>
> . . .
>
> (3) The county legislative body shall provide by ordinance, resolution, rule, or regulation for the manner in which property shall be acquired, managed, and disposed of.

Utah Code Ann. § 17-5-242.[2] This statute contains no express or implied statutory requirements for notice or hearing to the public. Accordingly, the court can only infer that the legislature left the decision of whether or not to give notice or a hearing before selling surplus real property to the discretion of the county commission in making its ordinances.

Pursuant to the grant of authority under § 17-5-242, Weber County passed an ordinance dealing with the selling of real property. It contains no express requirements of notice to and hearing before the public before selling:

> 6-11-12 Disposal of Surplus Property.
>
> . . .
>
> B. Real property may be disposed of by public auction, by listing with a licensed realtor, by negotiation, by trade, by sealed bid, or otherwise as disposition shall be approved by the County Commissioners prior to the commencement of negotiations or other means of disposition. The County Commissioners may refuse any or all offers or bids.

Weber County Ordinance § 6-11-12. This ordinance permits the county commissioners to sell real property through a variety of methods, approved by them. Some of these methods might naturally involve public notice, but others might not. In any event, this ordinance does not require a notice to and a hearing before the public before the county can sell real property.

Nonetheless, plaintiffs attempt to challenge the county's sale of the property to Jones by

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[2]Effective May 1, 2000, this section was renumbered to § 17-50-312.

claiming that it failed to comply with notice and hearing provisions found in the County Land Use Development and Management Act. Utah Code Ann. § 17-27-101, *et. seq.* Weber County acknowledges that it did not give any notices or hearings under the act because they were not necessary. Plaintiffs premise the application of the notice and hearing required under the act on a change in ownership that occurred when the county conveyed the property to Jones. They begin their argument with § 17-27-305:

> (1) After the legislative body has adopted a general plan or any amendments to the general plan, no street, park or other public way, ground, place, or space, no publicly owned building or structure, and no public utility, where publicly or privately owned, may be construed or authorized until and unless:
> (a) it conforms to the plan; or
> (b) it has been considered by the planning commission and, after receiving the advice of the planning commission, approved by the legislative body as an amendment to the general plan.
> (2) (a) Before accepting, widening, removing, extending, relocating, narrowing, vacating, abandoning, changing the use, acquiring land for, or selling or leasing any street or other public way, ground, place, property, or structure, the legislative body shall submit the proposal to the planning commission for its review and recommendations.
> (b) If the legislative body approves any of the items contained in Subsection (a), it shall also amend the general plan.

Plaintiffs focus their argument in subsection (2). They contend that in subsection (2)(a), the statute requires Weber County, "[b]efore . . . selling . . . any . . . public way, ground, place, or property . . . ," to "submit the proposal to the planning commission for its review and recommendations." Further, as provided in subsection (2)(b), "[I]f the legislative body approves any of the items contained in Subsection (a) [i.e., the sale to Jones], it shall also amend the plan." Thus, argue plaintiffs, before selling the property to Jones, the proposed sale should have been submitted to the planning commission for its review and recommendations to the county commission. Then, if the county commission approved the sale, it should have also amended the

plan before selling the property to Jones, requiring further public notice and hearing.

Plaintiffs maintain that this process would have provided two separate notices to the public and two public hearings, one before the planning commission and a second one before the county commission. Section 17-27-304 of the act provides that the "legislative body may amend the general plan by following the procedures required by § 17-27-303," the procedure used initially in adopting the plan. Section 17-27-303(1)(3) requires the planning commission to give "reasonable notice of [a] public hearing at least 14 days before the date of [a] hearing." After that hearing, the planning commission passes its recommendation on to the county commission. Then, § 303(3)(a) requires the county commission to hold a hearing and to provide "reasonable notice of the public hearing at least 14 days before the date of the hearing."

In summary, plaintiffs contend that before Weber County sold the property to Jones, state law required the county to amend the general plan, requiring two 14-day notices to the public and two public hearings. These hearings, assert plaintiffs, would have informed the public of and would have permitted comment on the sale and its purchase price.

Undergirding plaintiffs' analysis, however, is the erroneous premise that a change in ownership of surplus real property requires a change in the general plan. Plaintiffs defend this premise by pointing selectively to language in subsection (2)(b) referencing the selling of the real property, taking it out of the context of the whole section, and then connecting it to requirements of public notices and hearings that do not apply. Plaintiffs' interpretation of § 305 is unreasonable because it contravenes the legislative intent and the coherence of the section, read as a whole, and of the act itself.

The rules of statutory construction must be followed to correctly understand § 305.

Fundamentally, the court must construe this section to give effect to the legislature's underlying intent:

> [T]his Court's primary responsibility in construing legislative enactments is to give effect to the Legislature's underlying intent. Generally, the best indication of that intent is the statute's plain language. Thus, we will interpret a statute according to its plain language, unless such a reading is unreasonably confused, inoperable, or in blatant contravention of the express purpose of the statute. In addition, statutory enactments are to be so construed as to render all parts thereof relevant and meaningful, and . . . interpretations are to be avoided which render some part of the provision nonsensical and absurd.

Perrine v. Kennecott Min. Corp., 911 P.2d 1290, 1292 (Utah 1996). While § 305 (2)(a) plainly references selling ground, "statutory . . . interpretations are to be avoided which render some part of the provision nonsensical or absurd." *Id.* Because any action under subsection (2)(a) requires a plan amendment under subsection (2)(b), under plaintiffs' interpretation, the county must amend the plan to reflect merely Jones' ownership of the property, although the use of the property remains the same. The court disagrees this interpretation. Plaintiffs' interpretation ignores both subsection (1) of § 305 and an important rule of statutory construction that "statutory enactments are to be construed as to render all parts thereof relevant and meaningful." *Millett v. Clark Clinic Corp.*, 609 P.2d 934, 936 (Utah 1980). Further, "a statute should not be construed in a piecemeal fashion but as a comprehensive whole." *Clover v. Snowbird Ski Resort,* 808 P. 2d 1037, 1045 (Utah 1991).

Subsection (1) states that no authorization of the ground may occur unless "(a) it conforms to the plan; or (b) it has been considered by the planning commission and, after receiving the advice of the planning commission, approved by the legislative body as an amendment to the general plan." Read only by itself, without looking at the title to the section or

the act as a whole, the language in § 305 of "until or unless: (a) it conforms to the plan" is ambiguous. It is unclear in what way the pronoun "it" *conforms* to the plan.

Other rules of statutory construction assist with this ambiguity. Though not a part of the statute, it is appropriate to consider a statute's title if the language of the statute creates an ambiguity. *Jenkins v. Percival,* 962 P.2d 796, 800 (Utah 1998). The title to § 305 reads "Effect of the plan on public *uses*" (emphasis added). Another rule of construction is to look to the intent of the act itself. *See Evans v. Utah*, 963 P.2d 177, 184 (Utah 1998) (citation omitted) ("When we interpret statutes, our primary goal is to give effect to the legislature's intent in light of the purpose the statute was meant to achieve.") In so doing, it becomes plain that the general plan referenced in § 305 deals with property uses, not property ownership. Under § 17-27-103 (1)(h)(I), "General Plan" means a document that a county adopts to set forth general guidelines for proposed future development of land within the county. Subpart (ii) of the same section states that "General Plan" includes what is also commonly referred to as a "master plan."

The Weber County Commission adopted a general plan for the Ogden Valley with Resolution 46-96 on October 2, 1996. The resolution states, in sum, that the plan shall serve as a guide for community decisions in *development and land use policies* to encourage development in a responsible and deliberate fashion, thereby protecting the natural beauty of the Ogden Valley, its natural resources, and its slopes, ridge lines, view and entry corridors, wildlife habitat, and stream corridors. Nowhere in the state act or in the county resolution is the general plan concerned with ownership of property, which is the predicate of plaintiffs' interpretation of § 305. The general plan, under state law and county ordinance, deals only with *uses of property*, as defendants observe, and serves as a *guide* for development of real property consistent with the

identified uses to ensure integrity and function of the plan, regardless of public or private ownership.

Thus, going back to interpreting § 305(1)(a), and more particularly the legislative intent of the phrase "until or unless: (a) it conforms to the plan," it is clear to this court that this section addresses land uses that conform or do not conform to the plan. Subsection (1), therefore, authorizes the county commission to approve a disposition of the ground if the *use* conforms to the plan; otherwise, the planning commission must consider the non-conforming use and the county commission must approve the non-conforming use as a plan amendment.

Further, from a practical perspective, when the land use is not an issue before the county commission but only the fair market value of the property is at issue (which is the real thrust of plaintiffs' case), a review by the planning commission seems inane. Section 17-27-204 gives the planning commission power to review and make or offer recommendations to the county commission regarding land use and zoning changes, not to opine upon the property's fair market value.

Finally, to render all parts of § 305 relevant and meaningful, as proper statutory construction requires, this court must construe *both* subsections (1) and (2) of § 305 together in a way that harmonizes their underlying intent. *See Platts v. Parents Helping Hands*, 947 P.2d 658, 662 (Utah 1997) (holding that courts must construe statutory language so as to render all parts relevant, meaningful, and operative); *Beynon v. St. George-Dixie Lodge # 1743*, 854 P.2d 513, 518 (Utah 1993) (citation omitted) ("[I]f doubt or uncertainty exists as to the meaning or application of an act's provisions, the court should analyze the act in its entirety and 'harmonize its provisions in accordance with the legislative intent and purpose.'"); *Jensen v. Intermountain*

Health Care, Inc., 679 P.2d 903, 906 (Utah 1984) (citations omitted) ("[T]he meaning of a part of an act should harmonize with the purpose of the whole act. Separate parts of an act should not be construed in isolation from the rest of the act."). In doing so, the preceding analysis persuades the court, and the court rules as a matter of law, that *the selling of real property in § 305(2)(a) means a selling that results in a land use change not in conformity to the plan.* This interpretation renders subsection (2)(b) relevant and meaningful to the whole section. Changes in land use in the specific activities enumerated in subsection (2)(a), not in conformity with the plan, necessitate an amendment to the general plan, consistent with subsection (1)(a) and (1)(b). A change in ownership *per se* in subsection (2)(a) does not trigger a need for amendment to the plan under (2)(b), as plaintiffs contend, because there is nothing to amend under the plan. Plaintiffs' interpretation ignores the legislative intent of the entire section and of the act as a whole, both of which deal clearly with land use, not ownership.

Concluding this point, the county's sale of the property to Jones did not change the recreational use of the property under the plan; accordingly, the act did not require the county to provide public notices and hearings before selling the property. In the future, however, if Jones wishes to use the property for any purpose inconsistent with the plan, he will need to seek a land use change, requiring notices to the public, hearings before the planning commission and the county commission, and a plan amendment as required by § 305.

B. No Constitutional Requirement of Notice and Hearing

Plaintiffs assert that the citizens of Weber County have a constitutional right to notice and hearing, which lie at the heart of procedural fairness, before the sale of public land to Jones, and that the county's failure to give them notice and hearing deprived them of due process. They rely

on *W. & G. Co. v. Redevelopment Agency of Salt Lake City,* 802 P.2d 755 (Utah App. 1990), an eminent domain case involving the Neighborhood Development Act. Plaintiffs here argue that the case stands for the proposition that the statute of limitations is not triggered when notice is not given to the public. *W. & G.* is distinguishable from the case before this court and is inapposite because, first, unlike the plaintiffs in *W. & G.*, the plaintiffs in this case do not have a specific, individual interest in the property. The plaintiffs in *W. & G.* owned the property that was being condemned; thus, any taking without strict compliance with actual notice would be an unconstitutional taking without due process. Second, state law mandates precise statutory requirements for taking property under the power of eminent domain in *W. & G.*; however, in this case no statutory requirements exist for notice and hearing before the sale of county surplus real property. Moreover, the Utah Court of Appeals, in *Longley v. Leucadia Financial Corp.,* 960 P.2d 907, 210 (Utah App. 1998), expressly declined to extend *W. & G.* to a process not affecting individual property interests. Likewise, plaintiffs' reliance on *Longley v. Leucadia Financial Corp.,* 2000 Utah 69, 9 P.3d 762 (Utah 2000) before the Utah Supreme Court is misplaced. Foremost, both decisions are based on strict compliance with statutory requirements for published notice. No statutory notice requirements exist in the instant case. Furthermore, Chief Justice Howe's concurring opinion addresses the constitutional issue of due process:

> While Longley's constitutional right to due process may not have been violated, the statute above mentioned clearly gives him the right to a published notice that will inform the public of the diligence claimed and the reason for the request. *Thus it is a statutory right, not a constitutional right, which has been violated.*

Id. at ¶ 29, emphasis added.

In summary of this point, all of the cases that plaintiffs cite as authority for their position

involve an express statutory requirement for notice, where none exists in this case. Plaintiffs have no constitutional right to notice and hearing because they have no personal, vested interest in the property sold to Jones.

CONCLUSION

The court is sympathetic with plaintiffs' position that it is desirable that sales of publicly owned real property occur openly, through meaningful notices and hearings to the public, and perhaps that is a matter that the legislature ought to review. However, this court may not substitute its judgment for the legislature's and impose a requirement of notice and hearing where none exits under the law. This court has the responsibility to interpret the law only and then to follow it.

Under Utah law, the county has broad authority to determine how it will administer and sell publicly owned surplus real property. The law imposes no express or implied statutory requirement of notice and hearing before the sale of such property. As such, there was no requirement of public notice and hearing connected with the county's sale of surplus real property to Rulon Jones beyond the posting of the county commission's agenda, which included the sale of the property, and the public meeting before the county commissioners in which the sale of the property was discussed and approved. Further, the plaintiffs do not have any personal vested interest in the property upon which they can base a constitutional due process claim of right to notice and hearing.

The notice and hearing requirements that the plaintiffs contend the county violated deal with notices and hearings that must occur before the county authorizes changes in land use that do not conform the county's general plan. The general plan serves as an advisory guide for

community decisions in real property development and land use policies. It is concerned only with land use, to ensure the orderly and responsible development of real property, not with land ownership, as plaintiffs assert. The county's sale of the property to Jones did not change the recreational use of the property under the county's general plan. Accordingly, state law did not require the county to provide public notice and hearing before selling the property.

Finally, plaintiffs' claims are barred by the running of the statutory period provided in the act in which the plaintiffs seek judicial review of the county's conveyance of the property to Jones. No factual or legal basis exists to toll the running of this limitation period.

Therefore, the court dismisses the plaintiffs' complaint with prejudice. Mr. Burnett, in consort with Mr. Houtz, may prepare appropriate findings of undisputed fact, conclusions of law, and an order or judgment for the court's signature.

Dated this 29 day of December, 2000.

Michael D. Lyon

Michael D. Lyon, Judge

CERTIFICATE OF MAILING

I hereby certify that on the 29 day of December, 2000, I sent a true and correct copy of the foregoing ruling to counsel as follows:

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IN THE SECOND JUDICIAL DISTRICT COURT FOR WEBER COUNTY

STATE OF UTAH

BEN P. TOONE, KENT D. FULLER, ROBERT J. FULLER, HAYNES R. FULLER and ROGER E. CANNON, Plaintiffs, v. WEBER COUNTY, a political subdivision, the WEBER COUNTY COMMISSION and COMMISSIONERS GLEN BURTON, KEN BISCHOFF and CAMILLE CAINE, MARK DeCARIA, Weber County Attorney, RULON JONES, an individual, and JOHN & JANE DOES 1-10, Defendants/Counter-Plaintiffs.	**SUMMARY JUDGMENT AND ORDER OF DISMISSAL** 3 1 2001 Civil No. 990907314PR Judge Michael D. Lyon

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This matter came before the above-entitled Court, the Honorable Michael D. Lyon presiding, for consideration of cross-motions for summary judgment submitted on behalf of plaintiffs and defendants. The Court heard oral argument on a number of occasions, including January 13, 2000, February 24, 2000, May 18, 2000, and most recently on November 21, 2000. In addition, the Court held several telephone conferences with

counsel for the parties. Plaintiffs were represented by Robert B. Sykes. The Weber County defendants were represented by Jody K Burnett. Defendant Rulon Jones was represented by Michael V. Houtz.

Following the conclusion of the briefing and hearing schedule, the Court took the matter under advisement, and having reviewed the legal memoranda, affidavits and exhibits submitted by the parties and having considered the arguments of counsel, and being fully advised, issued its Memorandum Decision dated December 29, 2000. Pursuant to that Memorandum Decision, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. The motions for summary judgment on behalf of the Weber County defendants and defendant Rulon Jones are hereby granted. The Court finds that there are no genuine issues as to any material facts and that the defendants are entitled to summary judgment on the claims asserted in the plaintiffs' Amended Complaint as a matter of law on the grounds more fully set forth in the Memorandum Decision of December 29, 2000, which is incorporated by this reference.

2. The plaintiffs' cross-motion for summary judgment is hereby denied for the reasons set forth in the Memorandum Decision of December 29, 2000.

3. Based on the judicial admission of defendants Weber County and Jones, the right-of-way was not conveyed and remains with Weber County, as reflected in the original conveyance to the county.

4. Based on the foregoing orders and for the reasons more fully set forth above, the plaintiffs' Amended Complaint, together with all claims or legal theories as set forth therein, is hereby dismissed, with prejudice and upon the merits, no cause of action.

DATED this 29 day of January, 2001.

BY THE COURT:

Michael D. Lyon
District Court Judge

Approval as to Form:

Robert B. Sykes
Attorney for Plaintiffs

1-17-01
Michael V. Houtz
Attorney for Defendant Rulon Jones

85233.1

STATE OF UTAH } SS.
COUNTY OF WEBER }
I HEREBY CERTIFY THAT THIS IS A TRUE COPY OF THE ORIGINAL ON FILE IN MY OFFICE.
DATED THIS 4 DAY OF Feb 20
PAULA CAYE
CLERK OF THE COURT
BY

STATE OF UTAH SECOND DISTRICT COURT OGDEN